

Virginia Regulatory Town Hall

Final Regulation Agency Background Document

Agency Name:	Virginia Department of Health
VAC Chapter Number:	12 VAC 5-585
Regulation Title:	Amendments to the Biosolids Use Regulations
Action Title:	Final Regulations
Date:	July 13, 2006

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*) , Executive Order Twenty-Five (98), and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment, instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published

A Petition for Rulemaking was submitted to the Virginia Department of Health by several corporations that have been issued permits for land application of biosolids in various Virginia Counties. The Petition requested that the Biosolids Use Regulations be amended with respect to the following requirements: 1. Posting of informational signs at permitted sites prior to and during land application of biosolids 2. Evidence of financial responsibility in a determined amount, provided by permit applicants and maintained by permitted entities. 3. Notification of Local Governments prior to the land application of biosolids at specific sites. The contents and timing of such notices is to be specified. 4. Development and implementation of spill prevention and response plans by permitted entities. 5. Methods for communicating information on complaints and reported incidents related to or arising from the land application of biosolids.

Changes Made Since the Proposed Stage

Please detail any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication. Please provide citations of the sections of the proposed regulation that have been altered since the proposed stage and a statement of the purpose of each change.

No changes have been made to the proposed amendments published in the *Virginia Register*, Volume 20, Issue 23, July 26, 2004.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

The State Board of Health adopted the proposed fee amendments as final amendments at their October 21, 2004 meeting in Richmond, Virginia.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and web site addresses, if available for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law

The Virginia Department of Health has received a Petition for Rulemaking from specific regulated entities, requesting that the Biosolids Use Regulations (12VAC 5-585) be amended to address certain issues raised by various Local Governments. The Biosolids Use Regulations (12 VAC 5-585) were adopted by the Board of Health, in 1995, under Section 32.1-164.5 of the Code of Virginia. The Biosolids Use Regulations were subsequently revised, effective on October 15, 1997, in accordance with the Virginia Administrative Process Act (APA). The APA (Section 2.2-4007.A of the Code of Virginia) provides that any person may petition an Agency to amend an existing regulation.

The necessary documentation will be forwarded to the State Registrar to initiate final approval of the amendments in accordance with the Administrative Process Act and the Virginia Department of Health Public Participation Guidelines.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The Regulations provide the means to protect public health from improper and unregulated disposal of sewage sludge. These amendments are to be designed to provide a consistent and uniform set of State requirements that will address a number of issues that Local Governments must routinely deal with. It is anticipated that the development of State requirements will eliminate the need to develop non-uniform local requirements in these areas of concern and prevent extended litigation, brought by permitted entities, concerning restrictive Local Government ordinances. These State requirements will protect public health by providing additional means to communicate health related concerns of the neighbors of land application sites. Those concerns can serve as a basis for additional operational restrictions placed on land applicators by the Virginia Department of Health to further protect those neighbors from any adverse impacts of land application operations.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action's detail.

The Petition for Rulemaking was submitted by Synagro WWT, Inc., Recyc Systems, Inc., and Nutri-Blend Inc., corporations that have been issued permits for land application of biosolids in various Virginia Counties, through the Biosolids Use Regulations (12 VAC 5-585). The Petition for Rulemaking requests that the Biosolids Use Regulations be amended with respect to the following requirements:

1. Posting of informational signs at permitted sites prior to and during land application of biosolids. Specifying sign dimensions, informational content and location.
2. Evidence of financial responsibility (such as liability insurance or other financial resources) in a determined amount, provided by permit applicants and maintained by permitted entities, established for the purpose of compensating third parties for personal injury or property damage, and removal or remediation of any established environmental contamination, resulting from the land application of biosolids.
3. Notification of Local Governments prior to the land application of biosolids at specific sites. The contents and timing of such notices is to be specified.
4. Development and implementation of spill prevention and response plans by permitted entities. Such plans are to also address the tracking of residues on State Roads by biosolids transport vehicles.

5. Methods for communicating information on complaints and reported incidents related to or arising from the land application of biosolids.

The requested amendments to the Biosolids Use Regulations will involve the following specific sections of the regulations:

1. 12 VAC 5-585-310
2. 12 VAC 5-585-460
3. 12 VAC 5-585-480
4. 12 VAC 5-585-490

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The petition was brought before the State Board of Health at their April 26, 2002 meeting for consideration of initiating the rulemaking process. The State Board of Health approved the development of amendments to the Biosolids Use Regulations followed by publication of a Notice of Intended Regulatory Action (NOIRA) at that meeting. Proposed amendments were subsequently developed through the the Biosolids Use Regulations Advisory Committee (BURAC) and brought to the State Board of Health at their October 25, 2002 meeting. The State Board of Health approved the proposed revisions at that meeting, with the provision that any public comments received following publication of the NOIRA be considered for any justified changes to the proposed amendments prior to publication in the Virginia Register. The NOIRA public comment period closed on December 6, 2002. The public comments received up to that date did not raise any new issues that had not been discussed at prior BURAC meetings.

The majority of the BURAC members were in favor of the draft amendment language. However, several members of the committee requested that more stringent requirements be included in the draft revisions and filed a minority report to the State Board of Health together with the Virginia Department of Health staff report. A few of the BURAC minority report recommendations were incorporated into the proposed amendments. In addition, a majority of committee members requested that the requirements for submittal of notifications to local government and requirements for posting of signs at land application sites be discretionary on the desires of local government. Thus, these requirements would take effect if required by an adopted local ordinance. However, the State has not authorized the localities to establish such discretionary requirements in relation to the Biosolids Use Regulations.

During the public comment period, including 3 public hearings, many comments about the biosolids program in general were received. Comments addressing the proposed amendments were received from the following (examples attached):

Comments in Opposition:

Local government: 1 (supporting more local control in Campbell County).

Citizens: 45 postcards and 60 prepared statements (opposing the proposed amendments in support of the minority report).

Comments in Support:

Industry: 3 (the petitioners for rulemaking).

Organizations: 2 (representing biosolid generators, Virginia Association of Municipal Wastewater Authorities and Hampton Roads Sanitation District).

Prior to their October 22, 2004 meeting, the Board of Health was presented with the proposed amendments as published in the *Virginia Register* on July 26, 2004. The Board was presented the summary of public comment, which included a number of recommended revisions to the proposed amendments. On October 22, 2004, the proposed amendment was presented to the Board of Health including the comments, both pro and con, received by VDH. VDH did not oppose three of the recommended revisions to the proposed amendments, but recommended that the proposed amendments should be adopted without change, giving VDH and local governments increased regulatory control of the contractors. The effect of these regulatory changes would then be reviewed following a period of implementation. The Board unanimously approved the proposed amendments as published and did not comment on the reason for rejecting any of the recommended revisions to the proposed amendments. The industry representatives present at the State Board of Health meeting did not object to the Board's adoption of the amendments without the suggested revisions.

The Department of Planning and Budget has expressed interest in the Board's rejection of the three revisions suggested by Nutri-Blend Inc., Recyc Systems, Inc., and the Virginia Association of Metropolitan Wastewater Agencies, Inc. VDH noted that there was no objection to certain language revisions proposed by these groups. The concern in adopting the suggested revisions revolves around the controversial nature of the Biosolids program and both public and Board of Health perception that VDH gives preferential treatment to requests made by the industry. The industry suggested revisions represent a very small number of comments in the total number of public comments received. Requiring the State Health Commissioner to revise the final amendment as approved by the Board would add fuel to citizen complaints that VDH disregards the directions of the Board and goes out of its way accommodate industry requests. VDH has decided that there is no justification to further delay the implementation of these amendments and can include the additional changes to the regulations in subsequent amendments.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

A Notice of the public comment period for the proposed amendments was forwarded to the State Registrar of Regulations and published in the *Virginia Register* on July 26, 2004. The 60 day public comment period ended on September 24, 2004. Three public hearings were scheduled and held. The first hearing was on August 17, 2004, in the Town of Warrenton, the second hearing was on August 18, 2004, in Henrico County and the third hearing was on August 19, 2004 in the Town of Farmville. The summary of public comments received and the agency response is as follows:

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SUMMARY OF COMMENT	AGENCY RESPONSE
<p>The Department of Planning and Budget (DPB) Economic Impact Analysis (EIA) Statement was published with the proposed amendments in the <i>Virginia Register</i> on July 26, 2004. Concerning the Minority Report recommendations, the EIA Statement noted that, “there is no evidence to suggest that more stringent requirements than those being proposed would provide any significant benefits, while imposing additional costs on the generators, appliers, and users of biosolids.”</p>	<p>The DPB analysis was directed to the potential fiscal impacts on the owners of sewage treatment works and on the local governments that may incur upon adoption of the proposed amendments. However, DPB did also consider the potential environmental and public health impacts may incur upon adoption of the proposed amendments. VDH concurs substantially with the conclusions drawn and the analysis contained in the EIA Statement. .</p>
<p>The BURAC Minority Report recommendations and the draft draft amendment revisions developed by Mr. Henry Staudinger included a number of additional requirements to be included in the proposed amendments. Approximately 45 postcards, 60 letters and several e-mails were received containing a standardized statement supporting the Minority Report recommendations (Attachment 1). Additional comments such as those received during the public hearing held in the Town of Farmville, expressed general disapproval of the permitting of land application of biosolids.</p>	<p>As noted in the EIA Statement some of the concerns underlying the Minority Report recommendations have been addressed in the proposed amendment, such as the additional financial responsibility provisions including, requirements for pollution liability insurance and a higher liability dollar amount for larger land applier firms. Other recommendations such as, requiring that nutrient management plans be prepared for all land application sites and requiring land applier certification of permit compliance, were not addressed by the Petition for Rulemaking and will be addressed by upcoming amendments now being prepared by VDH. Also, the current Biosolids Use Regulations provide for some of the Minority Report recommendations such as, the authority to require that additional testing of biosolids be made by the land applier. The additional notification and agency certification requirements recommended in the Minority Report were considered to be more stringent than that necessary to protect public health.</p>

SUMMARY OF COMMENT	AGENCY RESPONSE
<p>Ann Jennings, a senior scientist with the Chesapeake Bay Foundation recommended that the proposed amendments include the provisions of SB 1088 (2003) concerning nutrient management plans and certification of land applicator supervisors.</p>	<p>As noted in the Executive Summary presented to the State Board of Health, the Petition for Rulemaking was initially brought to the Board at their April 26, 2002 meeting and draft amendments were subsequently approved by the Board at their October 25, 2002 meeting. Thus the petition amendments were established prior to introduction and subsequent approval of the SB 1088 legislation. The SB 1088 provisions will be addressed by upcoming amendments now being prepared by VDH.</p>
<p>The Virginia Association of Metropolitan Agencies, Inc. recommends revising this Section to allow VDH to directly approve alternative forms of financial responsibility.</p>	<p>VDH has no objection to revising the proposed language as recommended. The revision would be as follows in brackets: “...or such evidence of financial responsibility [as the Board may establish by regulation <u>acceptable to the department based on information provided by the permittee</u>] in an amount .”.</p>
<p>Substantially increase the financial responsibility provisions.</p>	<p>VDH has no evidence that such increases are necessary.</p>
<p>Cambell County requested that this Section be revised to expressly give localities site approval authority. Synagro requested that this Section not be revised and that site specific approval remain with VDH in order to benefit all areas of agriculture.</p>	<p>The Biosolids Use Regulations (12 VAC 5-585-460) provide for land application on agricultural use sites including forest land (silviculture), as well as for land reclamation. The actual use of the land and the site specific features are the critical factors in approval of land application sites. Local zoning restrictions may not account for the specific site use and conditions. In addition, local zoning may be used to exclude land application of biosolids in conflict with the Biosolids Use Regulations. Thus, VDH does not recommend revising this section.</p>
<p>Judith Elliott of Campbell County recommended increasing the time period for prior notification of local government to 60 days.</p>	<p>As the local government has been previously notified by VDH and asked to comment on the proposed sites, VDH does not believe an extension of the 15-day minimum notification time is necessary. Land applier operation schedules are dependent on changing weather conditions and changes to farming operations which are difficult to predict beyond a period of several days.</p>

SUMMARY OF COMMENT	AGENCY RESPONSE
<p>Nutri-Blend, Inc. recommends using the Farm Service Agency (FSA) Tract Numbers to identify site specific locations.</p>	<p>VDH has no objection to revising the proposed language as recommended. The revision would be as follows in brackets: "...tax map number and farm service agency (FSA) farm tract number of parcels....take place. <u>[Tax map numbers are not required if not readily available]</u>].</p>
<p>Synagro, Inc. recommends that VDH establish a standardized procedure for documenting and dealing with complaints.</p>	<p>VDH believes that such standard procedures must provide for the flexibility necessary to process and investigate the variety of complaints now received and may be received in the future. These procedures can be best addressed through policy statements made available to the land appliers and the public.</p>
<p>David Laurrell and Judith Elliott of Campbell County recommended increasing the time period for posting signs at land application sites to 15 days and to 30 days, respectively.</p>	<p>As the local government has been previously notified by VDH and asked to comment on the proposed sites, VDH does not believe an extension of the 48-hour minimum time for posting of signs at land application sites is necessary. Land applier operation schedules are dependent on changing weather conditions and changes to farming operations which are difficult to predict beyond a period of several days.</p>
<p>The Virginia Association of Metropolitan Agencies, Inc. recommends revising this Section to allow local governments to waive the requirements for posting signs at land application sites.</p>	<p>VDH has been previously advised by counsel that the proposed amendments cannot provide for such a waiver that transfers authority directly to local government to not comply with a state regulation.</p>
<p>Judith Elliott of Campbell County recommended increasing the time period for signs to be posted at land application sites to 1 year following the end of operations. She also recommended including warning statements on the signs.</p>	<p>VDH does not believe that posted signs need to remain at land application sites for extended periods of time following land application. Agricultural sites are by nature subject to limited access. The signs are primarily intended to notify neighbors that the land application operations are initially imminent and then subsequently on-going. The use of warning statements on posted signs is not considered to be necessary in order to protect public health.</p>
<p>Recyc Systems, Inc. recommends revising this Section to remove the requirement for specifying a particular person or job title as the point of contact for the land applier.</p>	<p>VDH has no objection to revising the proposed language as recommended. The revision would be as follows in brackets: "...of the permit holder as well as the [name or title, and] telephone number..."</p>
<p>Recyc Systems, Inc. recommends revising this Section to include transport vehicle equipment requirements similar to the permit guidance used by the State of</p>	<p>VDH believes that specifying transport vehicle features that will help prevent leakage and spills is very desirable. However, a number of possible transport vehicle equipment provisions should be evaluated prior to amending the regulations and such revisions should be discussed by the</p>

Maryland.

BURAC. Thus, VDH is not revising this Section at this time.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the differences that would be the effect of the changes.

The requested amendments to the Biosolids Use Regulations will involve the following specific sections of the regulations:

1. 12 VAC 5-585-310

The permitted contractor would be required to furnish evidence of current liability insurance or other methods of assuring financial responsibility (established by regulation) in an amount not less than one million dollars, up to two million dollars for the larger contractors. Such insurance would be necessary to obtain and hold a state permit.

2. 12 VAC 5-585-460

The permitted contractor would be required to notify local governments if required by local ordinance, at least 15 days in advance of commencing land application operations, by submitting written notification that includes information identifying the land application sites, estimated dates of operations and telephone numbers of contact personnel with the contractor, the biosolids producer and the Virginia Department of Health. In addition, The permitted contractor would be required to notify local governments and the Virginia Department of Health within 24 hours of the receipt of a complaint of the actions taken to resolve the complaint. Also, the contractors would be required to document their responses to complaints.

3. 12 VAC 5-585-480

The permitted contractor would be required to post signs at land application sites, at least 48 hours in advance of commencing land application operations. The signs must be visible and readable from a public right of way and contain specific information. The signs must remain in place both, during and 48 hours following, the land application operations.

4. 12 VAC 5-585-490

The permitted contractor would be required to prevent the drag-out and tracking of dirt, debris and biosolids on public roads from their land application operations. The proposed amendments will include specific requirements for reporting of any off-site spills of biosolids. The permitted contractor is made responsible for assuring and reporting on, the prompt clean up of spills and any tracking of solids onto roads.

